Supreme Court, U.S.
FILED
APR 8 1999
OFFICE OF THE CLERK

No. 98-1449

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*,

Petitioners,

v.

DENICE H. REIN, *et al.*,

Respondents,

-and-

UNITED STATES OF AMERICA,

Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LEE S. KREINDLER, Chairman
Counsel of Record
STEVEN R. POUNIAN
JAMES P. KREINDLER
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

On the Brief:
JAMES P. KREINDLER
DAVID L. FIOL

Attorneys for Respondents
(additional counsel listed on inside cover)

152332

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

FRANK H. GRANITO, JR.
FRANK H. GRANITO, III
SPEISER, KRAUSE, MADOLE,
NOLAN & GRANITO
140 East 45th Street, 34th Floor
New York, New York 10017
(212) 661-0011

MICHEL F. BAUMEISTER
BAUMEISTER & SAMUELS
One Exchange Plaza
New York, New York 10006
(212) 363-1346

JEROME L. SKINNER
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., LPA
1513 Central Trust Tower
Cincinnati, Ohio 45202
(513) 621-0267

READ K. McCAFFREY
PATTON BOGGS, LLP
2550 M Street, N.W.
Washington, DC 20037-1350
(202) 457-6315

DOUGLAS E. ROSENTHAL
SONNENSCHEIN, NATH
1301 K Street, N.W.
East Tower, Suite 600
Washington, DC 20005
(202) 408-6400

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Constitutional Provisions and Statutes Involved ...	1
Statement of the Case	3
Reasons for Denying the Writ	4
I. No Writ Should Be Granted On The Basis Of Petitioners' Separation Of Powers Argument Because The Decision Below Was Correct, Both On The Standing Grounds Explicitly Relied Upon By The Court Of Appeals, And On The Merits.	4
A. The Court of Appeals Properly Held that Petitioners Lack Standing to Challenge the Constitutionality of the 1996 Amendments.	5
B. In Making Sovereign Immunity Determinations, The Executive Exercises its Own Power Over Foreign Relations, Not a Power Delegated by Congress.	7
C. There Was No Delegation of Congressional Powers in the 1996 FSIA Amendments	15

Contents

Page

D. Cooperation Between the Executive and Legislative Branches Reflected in the 1996 Amendments Is Not Tantamount to Improper Delegation 16

II No Writ Should Be Granted To Review The Court Of Appeals' Refusal To Address Personal Jurisdiction, Because The Decision Was Correct And Petitioners' Substantive Argument Is Meritless. 18

III. No Writ Should Be Granted To Review The Court Of Appeals' Refusal To Address The Question Of Pendent Party Jurisdiction Over Alien Tort Claims Act Claims, As The Issue Was Not Reviewable Under The Collateral Order Doctrine. 21

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases:

Bowsher v. Snyar, 478 U.S. 714 (1986) 6

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 7

Calder v. Jones, 465 U.S. 783 (1984) 19

Clements v. Fashing, 457 U.S. 957 (1982) 6, 7

County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979) 6

Dames & Moore v. Regan, 453 U.S. 654 (1981) ... 13, 14

First Nat. City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) 8

Good v. Ohio Edison Co., 104 F.3d 93 (6th Cir. 1997) 20

In re: Flor, 79 F.3d 281 (2d Cir. 1995) 20

Jones v. United States, 137 U.S. 202 (1890) 14

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) 16

Keene Corp. v. United States, 508 U.S. 200 (1993) 16

Cited Authorities

	Page
Loving v. United States, 517 U.S. 748 (1996)	16
Mesa v. California, 489 U.S. 121 (1989)	12
Mistretta v. United States, 488 U.S. 361 (1989)	16
Mizuna, Ltd. v. Crossland Federal Savings Bank, 90 F.3d 650 (2d Cir. 1996)	12
National City Bank of New York v. Republic of China, 348 U.S. 356 (1955)	8
Oetjen v. Central Leather Co., 246 U.S. 297 (1918)	8
Pfizer, Inc. v. India, 434 U.S. 308 (1978)	14
Raines v. Byrd, 521 U.S. 811, 117 S. Ct. 2312 (1997)	6
Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992)	19
Swint v. Chambers County Com'n, 514 U.S. 35 (1995)	18, 21
United States v. Brumage, 377 F. Supp. 144 (E.D.N.Y. 1974)	18
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)	9

Cited Authorities

	Page
United States v. Gurrola-Garcia, 547 F.2d 1075 (9th Cir. 1976)	18
United States v. Hays, 515 U.S. 737 (1995)	6
United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950)	15, 16
United States v. Streets, Alleys and Public Ways, 531 F.2d 882 (8th Cir. 1976)	20
Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)	7, 8, 10, 12
World-wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)	19
Yakus v. United States, 321 U.S. 414 (1944)	17
Statutes:	
22 U.S.C. § 2371	1, 18
28 U.S.C. § 1292(b)	4, 20, 21
28 U.S.C. § 1330	12
28 U.S.C. §§ 1605-1607	12, 17
49 U.S.C. § 46501(2)	19

Cited Authorities

	Page
50 U.S.C. §§ 1701-1706	13
50 App. U.S.C. § 2405	5, 17
United States Constitution:	
Article I	10
Article II, Section 2	1, 8
Article II, Section 3	1, 8
Article III	6, 10
Article III, Section 2	1, 7, 10
Fifth Amendment	19
Rules:	
Fed. R. Civ. Proc. Rule 54(b)	20
United States Supreme Court Rule 10	18
Other Authorities:	
47 FR 11247 (March 16, 1982)	5
143 Cong. Rec. E1599-02, 1600 (Extended Remarks of Rep. J. Fox, July 31, 1997)	6

Cited Authorities

	Page
Antitterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 (Apr. 24, 1996), 110 Stat. 1214 ..	5
Iran and Libya Sanctions Act of 1996, Pub. L. 104-172 (Aug. 5, 1996), 110 Stat. 1541, § 3	5
Pub. L. 101-222, 103 Stat 1892 (December 12, 1989)	5
Pub. L. 104-132 (Apr. 24, 1996), § 324	5

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution, Article II, Section 2, second paragraph, states as follows:

> [The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls. . . .

2. The Constitution, Article II, Section 3, first paragraph, states in pertinent part as follows:

> [The President] shall receive ambassadors and other public ministers. . . .

3. The Constitution, Article III, Section 2, states:

> The judicial power shall extend . . . to Controversies between . . . a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

4. 22 U.S.C. § 2371 provides in part:

> Prohibition on assistance to governments supporting international terrorism
>
> (a) Prohibition. The United States shall not provide any assistance under this chapter, the Agricultural Trade Development and Assistance

Act of 1954 (7 U.S.C. 1691 et seq.), the Peace Corps Act (22 U.S.C. 2501 et seq.), or the Export-Import Bank Act of 1945 (12 U.S.C. 635 et seq.) to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism.

(b) Publication of determinations. Each determination of the Secretary of State under subsection (a) of this section, including each determination in effect on December 12, 1989, shall be published in the Federal Register.

(c) Rescission. A determination made by the Secretary of State under subsection (a) of this section may not be rescinded unless the President submits to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate —

(1) before the proposed rescission would take effect, a report certifying that —

(A) there has been a fundamental change in the leadership and policies of the government of the country concerned;

(B) that government is not supporting acts of international terrorism; and

(C) that government has provided assurances that it will not support acts of international terrorism in the future; or

(2) at least 45 days before the proposed rescission would take effect, a report justifying the rescission and certifying that —

(A) the government concerned has not provided any support for international terrorism during the preceding 6-month period; and

(B) the government concerned has provided assurances that it will not support acts of international terrorism in the future.

STATEMENT OF THE CASE

Petitioners' statement of the case is accurate but incomplete. Because Petitioners ask this Court to order immediate consideration by the Court of Appeals of the fact-dependent issue of personal jurisdiction, all information relevant to that issue should be provided.

Respondents filed with the District Court an attorney's affidavit specifically addressed to the issue, identifying evidence that the Flight 103 aircraft was registered in the United States, owned and operated by a United States corporation flying a United States flag, flown subject to a myriad of United States laws and regulations including

security regulations, bound directly for the United States and occupied by almost two hundred United States citizens. (J.A. at A-39, 51-57, 77-82). Additional evidence indicates the Petitioners selected Flight 103 for destruction specifically because of the foregoing facts, intending to cause harm to United States citizens and interests. (J.A. at A-39, 46, 51-57, 77-82).

Petitioners premised appellate jurisdiction solely on the collateral order doctrine, and made no written or oral motion for the District Court to certify any issue for immediate appeal under 28 U.S.C. § 1292(b). Petitioners were put on notice that their appeal might be severely circumscribed by jurisdictional problems when, on October 19, 1998, the Court of Appeals requested the parties to submit supplemental briefs on the issue of appellate jurisdiction over all issues other than subject matter jurisdiction.

REASONS FOR DENYING THE WRIT

I.

NO WRIT SHOULD BE GRANTED ON THE BASIS OF PETITIONERS' SEPARATION OF POWERS ARGUMENT BECAUSE THE DECISION BELOW WAS CORRECT, BOTH ON THE STANDING GROUNDS EXPLICITLY RELIED UPON BY THE COURT OF APPEALS, AND ON THE MERITS.

Petitioners advance a substantial number of misdirected political arguments which have no place before this Court, such as Petitioners' complaint that suits against foreign states authorized by the 1996 Amendments to the Foreign Sovereign Immunities Act ("FSIA") "are destructive of the U.S.

Government's efforts to ease strained relations between the United States and those states." Pet. at 16. We will only address Petitioners' legal claims, not their foreign policy positions.

A. The Court of Appeals Properly Held that Petitioners Lack Standing to Challenge the Constitutionality of the 1996 Amendments.

When it passed the 1996 amendments to the FSIA, Congress was well aware of the Executive Branch's finding that Libya was a terrorist state. *See* Antitterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 (Apr. 24, 1996), 110 Stat. 1214, 1255 (finding "the President should continue to undertake efforts to increase the international isolation of state sponsors of international terrorism . . . and should oppose any future initiatives to ease sanctions on Libya or other state sponsors of terrorism."). *See also* Iran and Libya Sanctions Act of 1996, Pub. L. 104-172 (Aug. 5, 1996), 110 Stat. 1541, § 3 ("The failure of the Government of Libya to comply with Resolutions . . . of the Security Council of the United Nations, its support of international terrorism, and its efforts to acquire weapons of mass destruction constitute a threat to international peace and security. . . ."); Pub. L. 104-132 (Apr. 24, 1996), § 324.[1] Indeed, Congress' intent in

1. Petitioners complain that their search of the Federal Register revealed no published determination that Libya was a terrorist state, as is required by 50 U.S.C. App. 2405(j)(3). Pet. at 7 n. 4. Petitioners' search was fruitless because the publishing requirement was not in the original statute; it was added by Pub. L. 101-222, 103 Stat 1892 (December 12, 1989), well after Libya was named as a terrorist state. *See* 47 FR 11247 (March 16, 1982) ("Pursuant to the authority granted by section 6 of the Export Administration Act of 1979, the President

(Cont'd)

passing the 1996 FSIA Amendments, at least in part, was to subject Libya and its agents to civil liability for the Pan Am 103 bombing. 143 Cong. Rec. E1599-02, 1600 (Extended Remarks of Rep. J. Fox, July 31, 1997). Given these facts, the Court of Appeals correctly held that Petitioners could not object to Congress' actions.

The Court of Appeals' holding was a straightforward application of Article III standing doctrine. Standing must exist in every case, including challenges to Congressional delegations of power; indeed the requirement is more strictly applied when statutes are challenged on Constitutional grounds. *See Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312, 2317-18 (1997); *Bowsher v. Snyar*, 478 U.S. 714, 721 (1986). One of the fundamental requirements for standing is that "there must be a causal connection between the injury and the conduct complained of." *United States v. Hays*, 515 U.S. 737, 743 (1995).

> A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. As a general rule, if there is no constitutional defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

County Court of Ulster County, New York v. Allen, 442 U.S. 140, 155 (1979). *See also Clements v. Fashing*, 457 U.S. 957,

---

(Cont'd)
has determined that foreign policy controls affecting exports to Libya should be expanded. . . . Existing controls . . . continue in effect, as do existing controls for anti-terrorism purposes.").

965 n.3 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

Here, there is no "causal connection" between the exercise of jurisdiction over Petitioners, and the delegation of legislative authority that Petitioners complain of. Congress had already gone on record finding Libya to be a terrorist state.

Even if Petitioners had standing to advance an argument on the merits, they could not prevail, as the delegation of power by Congress that they object to was not a delegation at all.

B. In Making Sovereign Immunity Determinations, The Executive Exercises its Own Power Over Foreign Relations, Not a Power Delegated by Congress.

Petitioners' arguments come without even a pretense of reliance upon the text of the Constitution, or this Court's many decisions touching upon the power of the Executive in the area of foreign sovereign immunity. We believe a thoughtful examination of history and this Court's precedent dictates a finding that the 1996 Amendments to the FSIA are Constitutional.

Immunity from suit is conferred upon foreign nations as a matter of grace and comity, and is not a Constitutional right. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983). The Constitution does not even allude to the concept of foreign sovereign immunity; indeed Article III, Section 2 states that the jurisdiction of federal courts "shall extend . . . to Controversies between . . . a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Until the FSIA was passed, foreign sovereign immunity did not even have a statutory basis; determinations were almost exclusively within the province of the Executive, which made "suggestions of immunity" to which the judiciary "consistently . . . deferred." *Verlinden*, 461 U.S. at 486. *See also National City Bank of New York v. Republic of China,* 348 U.S. 356, 360 (1955) (State Department suggestions of immunity were accorded "significant weight" by courts).

The traditional "suggestions of immunity" were a natural facet of the Executive's Constitutionally delegated powers. The Constitution assigns the task of conducting foreign relations to the Executive and Legislative branches. *See* U.S. Constitution, Art. II, Sections 2-3; *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (*quoting Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative — 'the political' — departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.") Between the two branches, the President takes front seat in foreign affairs:

> As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. . . .
>
> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations-a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936).

Because this Court has been so careful to preserve and protect the Executive's powers in this field, the Executive's "suggestions of immunity" were never seriously questioned.

While the FSIA codified the rules of sovereign immunity and charged the federal courts with the task of applying those rules to each case, that statute could not and did not work a

change in the Constitutional allocation of powers among the branches.

Placed in this context, Petitioners' contention that the 1996 Amendments improperly delegated a legislative function to the Executive is untenable. If the Executive could make all determinations regarding immunity prior to 1976, surely Congress could restore to the Executive a small fraction of that power.

Petitioners' argument to the contrary arises in part from a misreading of *Verlinden*. According to Petitioners, *Verlinden* stands for the proposition that "sovereign immunity under the FSIA is a jurisdictional issue, not an affirmative defense. . . ." Pet. at 15. This equation of sovereign immunity with the jurisdiction of the federal courts is the linchpin of Petitioners' claim that Congress improperly delegated to the Executive the function of establishing the jurisdiction of the federal courts. However, Petitioners misread *Verlinden*.

Verlinden was an action between two foreign states. Article III, Section 2 of the Constitution does not grant federal courts jurisdiction over such cases *per se*; jurisdiction could only be supplied by the "arising under" clause. Discussing the holding of the Court of Appeals below, this Court noted that Article III "arising under" jurisdiction cannot be invoked by a statute that simply declared that federal courts could assert jurisdiction over a certain class of cases; rather, Article III "arising under" jurisdiction exists only over claims involving some substantive rule of federal law, enacted by Congress pursuant to the powers enumerated in Article I. 461 U.S. at 495-96. This Court concluded that the rules regarding sovereign immunity codified in the FSIA were not simply jurisdictional, but embodied substantive federal law, and could form the basis for "arising under" jurisdiction.

> [I]n enacting the Foreign Sovereign Immunities Act, Congress expressly exercised its power to regulate foreign commerce, along with other specified Article I powers. See n. 19, supra. As the House Report clearly indicates, the primary purpose of the Act was to "se[t] forth comprehensive rules governing sovereign immunity," H.R. Rep. No. 94-1487, at p. 12; the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. *The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law;* and applying those standards will generally require interpretation of numerous points of federal law. Finally, if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States —manifestly, "the title or right set up by the party, may be defeated by one construction of the . . . laws of the United States, and sustained by the opposite construction." *That the inquiry into foreign sovereign immunity is labeled under the Act as a matter of jurisdiction does not affect the constitutionality of Congress' action in granting federal courts jurisdiction over cases calling for application of this comprehensive regulatory statute.*

461 U.S. at 496-97 (citations omitted, emphasis added).

In *Mesa v. California*, 489 U.S. 121 (1989), this Court left no doubt about what it held in *Verlinden*:

> In Verlinden we held that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, is a "comprehensive scheme" comprising both pure jurisdictional provisions and federal law capable of supporting Art. III "arising under" jurisdiction. 461 U.S., at 496.

489 U.S. at 136. *See also Mizuna, Ltd. v. Crossland Federal Savings Bank,* 90 F.3d 650, 656 (2d Cir. 1996) (this Court "emphasized that the Foreign Sovereign Immunities Act did more than merely recite a grant of access to the district court; it expressly invoked the powers of Congress to regulate foreign commerce, along with other Congressional powers, and constituted a comprehensive scheme for the conferring or withholding of foreign sovereign immunity.")[2].

That sovereign immunity remains a substantive element of federal law is demonstrated by the fact that while state courts retain jurisdiction over actions against foreign sovereigns, the FSIA codifies the affirmative defense of immunity in those courts as well. *Verlinden*, 461 U.S. at 489. Congress has no power to define the jurisdiction of the state

---

2. The structure of the FSIA itself supports this conclusion. The substantive provisions regulating the immunity of foreign states are found at 28 U.S.C. § 1605, *et seq*. The jurisdictional grant is separately located within the jurisdictional provisions of the same title, at 28 U.S.C. § 1330, and it states that the District Courts will have subject matter jurisdiction over any claims where "the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." Congress obviously did not view sovereign immunity as purely a jurisdictional matter.

courts, and can only enact a substantive defense that applies to actions in state courts.

The distinction between substantive law governing claims against foreign states and the rules governing the jurisdiction of the federal courts was applied by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The plaintiff had obtained a U.S. judgment for breach of contract against Iran, but pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, the President froze all Iranian assets in the U.S. He later negotiated the release of hostages held in Iran, in part by agreeing to release the assets. This precluded the plaintiff from enforcing its U.S. judgment. Nevertheless, this Court rejected the assertion that the jurisdiction of the federal courts was improperly circumscribed by Executive action:

> Petitioner . . . asserts that Congress divested the President of the authority to settle claims when it enacted the Foreign Sovereign Immunities Act of 1976 (hereinafter FSIA), 28 U.S.C. §§ 1330, 1602 et seq. The FSIA granted personal and subject-matter jurisdiction in the federal District Courts over commercial suits brought by claimants against those foreign states which have waived immunity. 28 U.S.C. § 1330. . . . Petitioner thus insists that the President, by suspending its claims, has circumscribed the jurisdiction of the United States courts in violation of Art. III of the Constitution.
>
> We disagree. . . . The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change

> in the substantive law governing the lawsuit. Indeed, the very example of sovereign immunity belies petitioner's argument. No one would suggest that a determination of sovereign immunity divests the federal courts of "jurisdiction." Yet, petitioner's argument, if accepted, would have required courts prior to the enactment of the FSIA to reject as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity.

453 U.S. at 684-85. *See also Pfizer, Inc. v. India*, 434 U.S. 308, 319-20 (1978) ("only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."); *Jones v. United States,* 137 U.S. 202 (1890) (Statute granting the federal courts jurisdiction over crimes committed on islands that the State Department found to be "appertaining" to the United States was constitutional, and the U.S. District Court had jurisdiction to try a defendant for a murder committed on such an island).

Viewed from a Constitutional perspective, the jurisdiction of the federal courts and the sovereign immunity of foreign states are not the same thing. Control of the former is allocated to Congress; power over the latter is shared by the Executive and Legislative. Congress' decision to make the jurisdiction of the federal courts a function of sovereign immunity cannot deprive the Executive of its Constitutional power to make foreign policy decisions, including decisions that have sovereign immunity implications. In making sovereign immunity determinations, the Executive exercises its own powers, not those of Congress.

C. There Was No Delegation of Congressional Powers in the 1996 FSIA Amendments

Because the Executive has the Constitutional power to make foreign sovereign immunity determinations, Congress has no need to delegate that power to it. Thus, the Petitioners' delegation of powers argument must fail, because there was no delegation.

A situation much like this one was presented in *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). There, an alien challenged her exclusion from the United States by officials of the State Department, who were acting under both statutory authority and State Department regulations. This Court found that she had no viable argument that Congress had improperly delegated functions to the Executive:

> Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

338 U.S. at 542 (citations omitted).

Here, as in *Knauff*, the right to identify foreign states who engage in terrorist activity, and deprive them of sovereign immunity, "is inherent in the executive power to control the foreign affairs of the nation." The fact that Congress has chosen to attach some jurisdictional import to that factual determination by the Executive does not thereby render that determination a legislative function.

D. Cooperation Between the Executive and Legislative Branches Reflected in the 1996 Amendments Is Not Tantamount to Improper Delegation

Even if the 1996 Amendments were viewed as a delegation, they withstand any Constitutional scrutiny. While the power to determine the jurisdiction of the lower federal courts rests in the hands of Congress, e.g. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993), there is no basis for Petitioners' claim that Congress may not rely upon the Executive branch's exercise of its foreign policy functions.

> We . . . have recognized . . . that the separation-of-powers principle, and the non-delegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches. . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.

Mistretta v. United States, 488 U.S. 361, 372 (1989) (*quoting J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). *See also Loving v. United States*, 517 U.S. 748 (1996) (the "Framers' choice . . . was to give Congress the same flexibility to exercise or share power as times might demand.") The narrow, factual determination required of the Executive in this case is entirely appropriate:

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.

Yakus v. United States, 321 U.S. 414, 424 (1944).

In 28 U.S.C. § 1605(a)(7), Congress alone resolved to deny sovereign immunity in cases involving injuries resulting from "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." Congress alone determined that the exception to immunity would be further limited by applying it only to countries who engaged in or supported repeated acts of terrorism. The only function left to the Executive is one to which it alone is suited: evaluating the flow of information gathered by diplomatic and intelligence officials to make the factual determination required by Congress' broad policy directive.

Notably, the lists referred to by the FSIA have been maintained by the Executive in one form or another for decades. The first list, compiled under 50 App. U.S.C. § 2405, regulates export by U.S. manufacturers of military and

strategic goods and has been law in various forms since the 1940s. *See United States v. Brumage*, 377 F. Supp. 144, 146 (E.D.N.Y. 1974). The second list is compiled by authority of 22 U.S.C. § 2371, which was enacted 20 years ago and prohibits foreign assistance to terrorist states. No Court has questioned the constitutionality of either statute. *See United States v. Gurrola-Garcia*, 547 F.2d 1075, 1078-79 (9th Cir. 1976).

II.

NO WRIT SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' REFUSAL TO ADDRESS PERSONAL JURISDICTION, BECAUSE THE DECISION WAS CORRECT AND PETITIONERS' SUBSTANTIVE ARGUMENT IS MERITLESS.

While respondents were anxious to have the Court of Appeals reject petitioners' personal jurisdiction claims, that court has written a thoughtful opinion which applies the guidance recently proved by this Court in *Swint v. Chambers County Com'n*, 514 U.S. 35 (1995). We see no basis for this Court to grant a writ.[3]

Moreover, we do not believe that the Petitioners suffered any disadvantage as a result of the Court of Appeals' refusal to address the personal jurisdiction issue, because their argument on the merits is not the least bit compelling. The

---

3. While it does appear that the decision below might conflict with the position taken by panels of the D.C. Circuit, it is far too early to preclude the possibility that the two Circuit Courts will resolve the conflicts themselves. Moreover, it can hardly be said that this issue is "important" under Rule 10 of the Rules of this Court, since it arises so rarely.

minimum contacts required by the Due Process Clause of the Fifth Amendment exist when a sovereign state and its agents target United States citizens for death with the specific intent of injuring the United States and its interests. This conduct alone is enough for a United States court to exercise personal jurisdiction over defendants, even if they never set foot in the United States. *Calder v. Jones*, 465 U.S. 783, 788-90 (1984); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992).

The contacts with the United States actually go much further than an attack on its citizens from afar: respondents filed an affidavit with the District Court outlining evidence that the Petitioners set out to accomplish their goals by bombing an aircraft that was owned and operated by a United States airline, and which would have next landed at Kennedy Airport in New York, had the bomb not destroyed the aircraft. It could not offend "traditional notions of fair play" for a United States court to exercise jurisdiction under these circumstances. *Compare* 49 U.S.C. § 46501(2) (establishing "special aircraft jurisdiction of the United States," which covers, inter alia, "a civil aircraft of the United States," and crimes committed on *any* aircraft which is destined to and does land in the United States).

Below, Petitioners did advance one novel argument — that they could not have anticipated being haled into court in the United States because under United States law at the time, they were completely immune from suit for the acts in which they engaged. This argument seeks to invoke this Court's holding that the "defendant's conduct and connection with the forum State must be such that [it] should reasonably anticipate being haled into court there." *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The argument was properly rejected.

The argument misconstrues the core basis of a personal jurisdiction analysis. In considering whether a defendant could reasonably expect to be subject to suit in a particular jurisdiction, no court has ever accepted the proposition that a defendant could point to the substantive law of that jurisdiction, and argue that it expected legal immunity. The argument attempts to fold an ex post facto clause consideration into personal jurisdiction analysis, even though the ex post facto clause has no application to a claim for civil damages.

Denial of the Petition here is especially warranted given the route by which Petitioners' personal jurisdiction claims have reached this court. No court has faced the particular personal jurisdiction questions raised here. On that basis, Petitioners could have sought certification under 28 U.S.C. § 1292(b). Such a motion could have been entertained and granted by the District Court, even after the interlocutory appeal had been filed. *See In re: Flor*, 79 F.3d 281, 284 (2d Cir. 1995); *United States v. Streets, Alleys and Public Ways*, 531 F.2d 882, 884 n.1 (8th Cir. 1976); *Compare Good v. Ohio Edison Co.*, 104 F.3d 93 (6th Cir. 1997) (Fed. R. Civ. Proc. Rule 54(b) certification obtained after the filing of a notice of appeal can validate an appeal over which the Court of Appeals would otherwise lack jurisdiction).

Petitioners were placed on notice that the Court of Appeals might be unable to consider the personal jurisdiction issue on the basis of the collateral order doctrine, when that court issued its order requesting supplemental briefs. Petitioners chose to remain inert. The decision below will not preclude future litigants from seeking appropriate interlocutory review under 28 U.S.C. § 1292(b), in conjunction with an appeal based on the collateral order doctrine.

III.

NO WRIT SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' REFUSAL TO ADDRESS THE QUESTION OF PENDENT PARTY JURISDICTION OVER ALIEN TORT CLAIMS ACT CLAIMS, AS THE ISSUE WAS NOT REVIEWABLE UNDER THE COLLATERAL ORDER DOCTRINE.

Having correctly decided that Petitioners enjoy no immunity from suit by United States nationals and their survivors under the FSIA, the Court of Appeals properly refused to exercise appellate jurisdiction over the Alien Tort Claims Act issue under the collateral order doctrine. Decisions reviewable under the collateral order doctrine are those that are "conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Com'n*, 514 U.S. 35, 42 (1995). The last requirement of that test is not satisfied here.

Because Petitioners enjoy no immunity from suits brought by U.S. nationals, they must defend those actions on the merits. They will bear no greater burden by defending claims by foreign nationals that arise out of the very same facts. Therefore, whether Petitioners are found to be immune from suit under the Alien Tort Claims Act now, or later, is of no moment. Petitioners' immunity from suit by the Alien plaintiffs is an issue that is "effectively reviewable" after trial and judgment by the District Court.

Moreover, perhaps even more than the personal jurisdiction issue, this issue was amenable to certification by the District Court under 28 U.S.C. § 1292(b). Petitioners chose to forego that avenue for appeal, and should not be heard to complain now.

CONCLUSION

For the reasons provided above, the petition should be denied.

Respectfully submitted,

LEE S. KREINDLER, Chairman
Counsel of Record
STEVEN R. POUNIAN
JAMES P. KREINDLER
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

FRANK H. GRANITO, JR.
FRANK H. GRANITO, III
SPEISER, KRAUSE, MADOLE,
NOLAN & GRANITO
140 East 45th Street, 34th Floor
New York, New York 10017
(212) 661-0011

MICHEL F. BAUMEISTER
BAUMEISTER & SAMUELS
One Exchange Plaza
New York, New York 10006
(212) 363-1346

JEROME L. SKINNER
WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., LPA
1513 Central Trust Tower
Cincinnati, Ohio 45202
(513) 621-0267

READ K. McCAFFREY
PATTON BOGGS, LLP
2550 M Street, N.W.
Washington, DC 20037-1350
(202) 457-6315

DOUGLAS E. ROSENTHAL
SONNENSCHEIN, NATH
1301 K Street, N.W.
East Tower, Suite 600
Washington, DC 20005
(202) 408-6400

Attorneys for Respondents

On the Brief:

JAMES P. KREINDLER
DAVID L. FIOL